

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

GIANT EAGLE, INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 23 CLC**

Case 06-CA-188991

**Administrative Law Judge
David I. Goldman**

Post-Trial Brief of Giant Eagle, Inc.

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POST-TRIAL BRIEF OF GIANT EAGLE, INC.

The above captioned case came before Administrative Law Judge David I. Goldman on January 25, 2018, upon charges of unfair labor practices under Section 8(a)(1) of the National Labor Relations Act (the “Act”), 29 U.S.C. § 158(a)(1). Pursuant to Section 102.42 of the NLRB Rules & Regulations, undersigned counsel for Giant Eagle, Inc. (“Giant Eagle”), hereby files this post-trial brief in support of its argument that General Counsel for the National Labor Relations Board (“General Counsel”) and the charging party, United Food Commercial Workers International Union, Local 23, CLC (“Union”), have failed to demonstrate any unfair labor practices arising from Giant Eagle’s conduct between September 15, 2016, and December 8, 2016. For the reasons that follow, Giant Eagle respectfully requests that the Complaint in this matter be dismissed in its entirety.

I. Introduction

Giant Eagle is a supermarket chain which operates stores in Pennsylvania, Ohio, Maryland, and West Virginia, and employs thousands of employees. Over 5,700 of its employees in Pennsylvania are represented by the Union for collective bargaining purposes. On September 15, 2016, the Union filed a petition to represent a group of seven (7) catering

employees at Giant Eagle Store # 47 (“Employees”). (Joint Stipulations at ¶ 2). Shortly thereafter, a stipulated election agreement was approved by the NLRB and an election was scheduled. On October 7, 2016, the Store # 47 catering Employees elected the Union as their sole collective bargaining representative, and on October 17, 2016, the Union was formally certified as the exclusive collective bargaining representative of the Store # 47 catering department. (Joint Stipulations at ¶ 10).

This case arises from Giant Eagle’s conduct before and after the Union election. Specifically, the Complaint filed in this matter alleges that Giant Eagle violated Section 8(a)(1) of the Act through the following: (1) conditioning receipt of information regarding a wage increase on Employees requesting and obtaining a waiver from the Union; (2) conditioning receipt of information regarding health care benefits on Employees requesting and obtaining a waiver from the Union; (3) requesting that the Union waive its right to object to the election results in the event Giant Eagle promoted one of the catering Employees;¹ and (4) announcing, in writing to represented Employees, changes in Employees Income Security and Employee Savings Plans, without prior communication with the Union. (Complaint at ¶¶ 7-9).

Beyond vague and bald assertions that Giant Eagle interfered with, restrained, and coerced its Employees in the exercise of their rights under the Act, General Counsel has failed to articulate with any specificity how Giant Eagle committed unfair labor practices through the above referenced conduct. Rather, the evidence adduced at the January 25, 2018, hearing in this

¹Though the Complaint states that Giant Eagle “conditioned its consideration of a represented employee for promotion on employees requesting and obtaining a waiver,” at no point did Giant Eagle condition its consideration of the employee’s promotion application upon receipt of the waivers. (Complaint at ¶ 7(c)). Indeed, as will be discussed in further detail *infra*, the evidence demonstrates that Giant Eagle proceeded with the employee’s promotion application notwithstanding the fact that none of the waivers were signed. (Trial Transcript at 87).

matter, when considered in its proper context, demonstrates that Giant Eagle's actions were lawful and, indeed, respectful of its Employees' collective bargaining rights.

II. Statement of the Issues

- A. Whether General Counsel has demonstrated that Giant Eagle violated Section 8(a)(1) of the Act when Giant Eagle presented the catering Employees with waivers where the waivers did not ask the Employees to disclose their union sympathies to Giant Eagle and were not presented in an atmosphere that tended to coerce the Employees in the exercise of their rights under the Act.

Suggested Answer: No.

- B. Whether General Counsel has demonstrated that Giant Eagle violated Section 8(a)(1) of the Act when it provided the catering Employees with notice of a company-wide pension freeze where it subsequently provided the Union with notice and the opportunity to bargain on that issue.

Suggested Answer: No.

III. Argument

A. Legal Framework for Section 8(a)(1) violations

As noted above, the only charges against Giant Eagle related to its conduct surrounding the Union election in this matter allege four independent violations of Section 8(a)(1) of the Act. Pursuant to Section 8(a)(1) of the Act, an employer commits an unfair labor practice if it interferes with, restrains, or coerces employees in the exercise of their rights guaranteed by the Act. 29 U.S.C. § 158(a)(1). However, an employer's mere conveyance of "views, argument, or opinion" unaccompanied by any expression of "threat of reprisal or force or promise of benefit," shall not constitute an unfair labor practice. 29 U.S.C. § 158(c); *NLRB v. Gissel Packing Co.*,

395 U.S. 575, 616-18 (1969). In determining whether an employer has engaged in unlawful interrogation or coercion in violation of Section 8(a)(1) of the Act, the test is whether the disputed statement or conduct would reasonably tend to coerce or interfere with employee rights. *Multi-Ad Services*, 331 NLRB 1226, 1227-28 (2000). The inquiry is an objective one, rather than a subjective test turning on whether the employee was actually intimidated. *Id.* In making this determination, there are no particular factors that are mechanically applied. *A.S.V., Inc.*, 2015 NLRB LEXIS 432, *102-03 (June 9, 2015). Rather, courts look to all of the circumstances in determining whether the conduct at issue tended to be coercive. *Id.*

For the reasons set forth below, General Counsel has failed to demonstrate that Giant Eagle committed any unfair labor practices pursuant to Section 8(a)(1) of the Act.

B. Paragraph VII (a), (b) and (c) of the Complaint (Giant Eagle's use of Waivers)

In Paragraphs 7(a), (b), and (c) of the Complaint, General Counsel alleges three independent Section 8(a)(1) violations related to a series of waivers Giant Eagle presented to the catering Employees on September 26, 2016, and September 29, 2016, whereby the Union would agree not to assert unfair labor practice claims in the event Giant Eagle took certain actions requested by the Employees. Pursuant to the merit increase and health benefit waivers, Giant Eagle agreed to take the following actions specifically requested by the Employees before the election: (1) inform the Employees of the amount of employee merit increases for 2017; and (2) provide the Employees with details of the employee health benefits plan for 2017. In exchange for Giant Eagle taking these requested actions, the waivers specified that the Union would not bring unfair labor practice charges as a result of the disclosure of the requested information. Pursuant to the promotion waivers, which were presented after one of the Employees requested that Giant Eagle consider her application for a management promotion, the Union would agree not to challenge

the election results or bring any unfair labor practices in the event Giant Eagle promoted the Employee.

Though General Counsel has failed to adequately articulate the precise basis for its contention that presentment of the waivers violated Section 8(a)(1), it apparently maintains that, by presenting the waivers, Giant Eagle sought to elicit the union sympathies of the catering Employees in violation of the Board's decision in *Struksnes Construction Co.*, 165 NLRB 1062 (1967) (holding that polling of employee union sympathies violates Section 8(a)(1) unless certain safeguards are present). As will be explained in further detail *infra*, however, the evidence adduced at the January 25, 2018, hearing in this matter compels the conclusion that Giant Eagle did not violate Section 8(a)(1) by supplying the Employees with waivers, because neither the form nor the substance of the waivers asked the Employees to divulge their union sympathies, and the context in which the waivers were presented was not coercive with respect to employee rights under the Act. Accordingly, General Counsel has failed to demonstrate any violation of Section 8(a)(1) related to Giant Eagle's use of waivers during the Union election campaign.

1. Relevant Facts re: Paragraph VII (a), (b) and (c) of the Complaint (Giant Eagle's use of waivers)

During a meeting with Giant Eagle on September, 15, 2016, the same day that the representation petition was filed, the catering Employees informed Giant Eagle that the cost of health benefits was one of the primary reasons they were interested in being represented by the Union. (Trial Transcript at 79) (Kelli Murphy acknowledging that health benefits constituted a reason for the Union drive). In light of this concern, the Employees requested that Giant Eagle provide them with additional information regarding 2017 employee health benefits in advance of the Union election. During that same meeting, it was volunteered that catering employee Kelli

Murphy had initiated the organizing drive for the Union. (Trial Transcript at 78) (Kelli Murphy stating that on September 15, 2016, she volunteered to Giant Eagle that she had started the Union organizing drive).

On September 21, 2016, the catering Employees reiterated their desire for further information regarding 2017 health benefits. In response, Giant Eagle informed the Employees that it typically provides health benefits information during the beginning of open enrollment in October, but that it was reviewing whether it could lawfully share the details of the 2017 plan before the election. (Joint Exhibit 8(a)). At that time, the catering Employees indicated that they also were interested in receiving information regarding merit increases for 2017. (Trial Transcript at 100). Like the health benefit information, Employees are typically told the amount of merit increases in October of each year. (Joint Stipulations at ¶ 5).

On September 26, 2016, Giant Eagle informed the Employees that their request regarding 2017 health benefits and merit increases placed Giant Eagle in a difficult position. Giant Eagle explained to the Employees that it wanted to supply the information in advance of the election, as requested, but that it was concerned about the appearance of unduly influencing the vote.² (Joint Exhibit 8(b)). After sharing this concern with the Employees, Giant Eagle proposed a solution whereby it would supply the requested information before the election if the Union agreed not to file any objections or unfair labor practice charges as a result. *Id.* Giant Eagle simultaneously provided the catering Employees with copies of written waivers memorializing

² Though Giant Eagle acknowledges that the test for Section 8(a)(1) violations is an objective one and that its subjective motive does not necessarily exculpate it from liability, as will be discussed in further detail *infra*, the fact that Giant Eagle clearly communicated its concerns before ultimately presenting the Employees with the waivers demonstrates that, in context, no employee could have reasonably felt that the waivers tended to interrogate or coerce.

this proposal as a suggested mechanism for obtaining the Union's permission to supply the Employees with the requested information. (Joint Exhibits 2 and 3).

On September 28, 2016, during a make-up meeting with a catering employee who was unable to attend a prior meeting, it was volunteered to Giant Eagle that the vote would be four to three in favor of the Union. (Trial Transcript at 101). That same evening, Giant Eagle's human resources department learned, for the first time, that catering employee Kelli Murphy submitted a job application for a management position vacancy at another Giant Eagle store location. (Trial Transcript at 108). Nobody from Giant Eagle's human resources department prompted her to apply for the position and she had not discussed her application with anyone at Giant Eagle prior to submission. (Trial Transcript at 81 and 111). Because the interview process for the job coincided with the election campaign, Giant Eagle was once again presented with a dilemma. (Trial Transcript at 108-110). Specifically, if Giant Eagle offered her the position, the Union could have claimed that it did so in an effort to undermine the election. As with the Employees' request for health benefits and merit increase information, Giant Eagle's solution was to explain the dilemma to the Employees and present them with waivers that would allow Giant Eagle to promote her without fear that the Union would later challenge the election results on that basis. (Trial Transcript at 110).

The following day, on September 29, 2016, during another meeting with the catering Employees, Giant Eagle reiterated that it could not provide additional information regarding 2017 merit increases and health benefits unless the Union signed the waivers. (Joint Exhibit 8(d)). The Employees were then presented with waivers regarding Kelli Murphy's job application and were given assurances that her application would not impact the upcoming election in any way. Additionally, Kelli Murphy was personally assured that: (1) Giant Eagle

would not challenge her vote in the Union election; (2) she could continue to work in the Store # 47 catering department through the election date, regardless of the outcome of her interview; (3) she could reschedule her promotion interview, which she had unilaterally cancelled, either before or after the election; and (4) Giant Eagle would await its decision on her promotion application until after the election. (Joint Exhibit 8(d) at 3).³ Importantly, the promotion waivers specified that the Union was only waiving its right to challenge the election or bring an unfair labor practice claim in the event Kelli Murphy was promoted and that the Union reserved the right to bring such claims in the event she was not promoted. (Joint Exhibits 4 and 5).

On October 7, 2016, an election was held in which the catering Employees voted to be represented by the Union and the Union was subsequently certified as the exclusive bargaining representative of the Store # 47 catering Employees. (Joint Stipulations at ¶¶ 10-11).

2. Record Evidence Compels the Conclusion that General Counsel has failed to demonstrate any violation of Section 8(a)(1) of the Act from Giant Eagle's use of waivers.

General Counsel contends that the above conduct violated Section 8(a)(1) of the Act, arguing that Giant Eagle sought to elicit the Employees' Union sympathies by presenting the waivers. It is well-settled that an employer's interrogation of employees as to their union sympathies and affiliations may violate Section 8(a)(1) "because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953). Indeed,

³ On September 29, 2015, following the meeting in which the Employees were presented with waivers regarding Kelli Murphy's application, she was contacted to set up a final interview for her job application. At trial, Kelli Murphy acknowledged that Giant Eagle was proceeding with her application, notwithstanding the fact that none of the waivers were signed. (Trial Transcript at 87).

employers “cannot discriminate against union adherents without first ascertaining who they are.” *Struksnes Construction Co.*, 165 NLRB 1062 (1967) (citation omitted). Accordingly, an employer’s polling of employees for the purpose of ascertaining their union sympathies violates Section 8(a)(1), unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union’s claim of majority; (2) this purpose is communicated to the employees; (3) assurances against reprisal are given; (4) the employees are polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *Id.* at 1063. The Board has dispensed with the *Struksnes* safeguards, however, where, as here, the employees have already volunteered their union sentiments to the employer. *See Bushnell’s Kitchens, Inc.*, 222 NLRB 110 (1976) (observing that employees could not have feared reprisal for indicating whether they favored unionism where they had previously expressed their union sympathies to the employer). General Counsel’s contention that the waivers constituted unlawful polling under *Struksnes* and its progeny strains credulity for several reasons.

As noted, in determining whether conduct tended to be coercive under Section 8(a)(1), the allegations must be considered in light of all of the circumstances. *A.S.V., Inc.*, *supra*. With respect to the wage increase and health benefit waivers, the record reflects that the waivers were presented after the Employees specifically requested that Giant Eagle provide them with additional information regarding 2017 merit increases and health benefits. The Employees requested this information in advance of the election so that they could make an informed choice on whether to unionize. This request, however, put Giant Eagle in a difficult position, as it wanted to avoid any undue interference in the election. After clearly communicating its views in this regard to the catering Employees, it presented written documents to the Employees as a

suggested mechanism for obtaining the Union's waiver. **At no point did Giant Eagle instruct the employees to sign and return the waivers to Giant Eagle directly.**

Neither the form nor the substance of the waivers asked the Employees to divulge their union sympathies to Giant Eagle because there was no relationship between signing the waiver, and hence requesting the information on an accelerated basis, and being for or against the Union. *See, e.g., Kurz-Kasch, Inc.*, 239 NLRB 1044 (1978) (holding, *inter alia*, that a supervisor's distribution of "Vote No" buttons to employees constituted coercion under Section 8(a)(1) because the acceptance or refusal of the buttons forced employees to openly declare their union sympathies). Unlike the distribution of the "Vote No" buttons in *Kurz-Kasch, supra*, signing the waiver did not call upon the Employees to make an observable choice concerning their union sympathies. Rather, signing the waiver only indicated to the Union an interest in wanting to make an informed choice on election day.⁴

Moreover, when considered in the context of the Employees' request for important benefit information, Giant Eagle's presentment of the waivers, and its concomitant explanation regarding the dilemma raised by the Employees' request, was clearly intended to allow Giant Eagle to provide the requested information without the appearance of undue influence in the election. Given that Giant Eagle clearly communicated to the Employees the dilemma it faced and the rationale behind providing the waivers, no Employee could reasonably think that Giant

⁴ Moreover, unlike the employer in *McCormick Longmeadow Stone Co.*, 158 NLRB 1237, 1238-43 (1966), where the Board held that the employer violated Section 8(a)(1) of the Act when it presented the union with waivers and indicated that the employees would be "*deprived*" of benefits if the waivers were not signed, in this case, the waivers had nothing to do with whether the benefits in question would actually be conferred or withheld. Rather, the Employees here requested information that was scheduled to be released after the election on an accelerated basis. In accordance with the request, the waivers only addressed whether Giant Eagle could supply the Employees with the information and not whether they would ultimately receive such benefits.

Eagle was attempting to uncover union sympathies or otherwise restrain or coerce Employees in the exercise of their rights under the Act.

Turning to the promotion waiver, the record reflects that, before presenting this waiver, the catering Employees voluntarily divulged their union sympathies to Giant Eagle and informed the company that the vote on election day would be four to three in favor of the Union. Thereafter, Giant Eagle learned that one of the catering Employees who had played a central role in organizing the Union petition, Kelli Murphy, applied for a position with another Giant Eagle store. Because the interview process for the job coincided with the election campaign, Giant Eagle was once again placed in a difficult situation, as it wanted to avoid any appearance that it was attempting to undermine the election vote. As with the Employees' request for health benefit and merit increase information, Giant Eagle's solution was to explain the dilemma to the Employees and present them with waivers so that Giant Eagle could promote the employee without fear that the Union would later challenge the election results on that basis. In doing so, Giant Eagle assured all of the Employees that Kelli Murphy's promotion application would not impact the upcoming election.

Like the merit increase and health benefits waivers, neither the form nor the substance of the promotion waivers called upon the Employees to make an observable choice with respect to their Union sympathies. Indeed, it had already been volunteered to Giant Eagle that the vote would be four to three in favor of the Union, thereby negating any incentive for Giant Eagle to use the promotion waivers as a method of polling the Employees. Against this backdrop,

nothing about the promotion waivers sought to uncover the Union sympathies of any catering Employee or otherwise restrain any Employee from exercising their rights under the Act.⁵

C. Paragraph VIII of the Complaint (pension freeze notice)

In Paragraph 8 of the Complaint, General Counsel contends that Giant Eagle violated Section 8(a)(1) of the Act when, after the Union was certified, it provided the catering Employees with individual notice of a company-wide pension freeze without first communicating with the Union as the sole collective bargaining representative of the catering Employees. (Complaint at ¶ 8). As with the waivers, however, General Counsel's precise theory for finding an independent unfair labor practice arising from the pension freeze notices remains unclear.

1. *Relevant facts re: Paragraph VIII of the Complaint (pension freeze notice)*

On March 26, 2016, nearly six months before the Union filed its election petition in this matter, Giant Eagle made a business decision to freeze pension savings plans for all of its corporate and non-union employees in 2017. (Trial Transcript at 123). Its decision reflected an effort to control costs across the entire company and affected over 11,000 non-union employees. *Id.* In accordance with applicable ERISA and IRS rules, Giant Eagle planned to announce the pension freeze forty-five days in advance of the freeze taking place, *i.e.*, at least forty-five days before January 1, 2017.

As noted above, the Union was certified as the sole collective-bargaining representative of the Store # 47 catering Employees on October 17, 2017. On November 9, 2017, Giant Eagle provided notice of the 2017 pension freeze to thousands of employees. Inadvertently, notice of the freeze was also sent to the Store # 47 catering Employees. However, on December 8, 2016,

⁵ To the extent that General Counsel has suggested that Giant Eagle improperly disclosed the *fact* of Kelli Murphy's application to the other catering Employees, no such allegation was raised in the Complaint, and there is no NLRB precedent that would make such disclosure an unfair labor practice.

Giant Eagle provided the Union with notice of the pension freeze. (Joint Stipulations at ¶ 12). That same day, Giant Eagle entered into negotiations with the Union wherein the issue of the pension freeze was discussed. (Trial Transcript at 124-25).

The original Union charge in this matter alleged that Giant Eagle violated Section 8(a)(5) of the Act when it provided the catering Employees with notice of the pension freeze because it “engaged in this conduct without prior notice to the [U]nion and without having afforded the [U]nion an opportunity to negotiate and bargain as the exclusive representative of [Giant Eagle]’s employees.” (Original Charge, 11/28/2016, at ¶ 8). Ultimately, however, General Counsel did not pursue any claim against Giant Eagle under Section 8(a)(5), concluding that any technical defect in the pension freeze notice was cured when Giant Eagle subsequently provided the Union with notice and an opportunity to bargain on that issue. Accordingly, the only remaining claim against Giant Eagle related to the pension freeze alleges an independent violation of Section 8(a)(1).

2. Record Evidence Compels the Conclusion that General Counsel has failed to demonstrate any violation of Section 8(a)(1) related to Giant Eagle’s announcement of a company-wide pension freeze.

There are two separate legal standards that apply to a union’s allegation that an employer improperly withheld employee benefits. *Wal-Mart Stores, Inc.*, 352 NLRB 815 (2008) (observing a different legal standard applies when an employer withdraws or withholds benefits *during* an election campaign than when an employer withholds benefits *after* a union is certified).⁶ During a union organizing campaign, an employer must maintain the status quo with

⁶ In *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), the U.S. Supreme Court held that all Board decisions must have three members in order to satisfy quorum. Though not specifically mentioned by the *New Process Steel* Court, the Board’s decision in *Wal-Mart* was rendered by a

respect to wages and benefits and proceed as though the union were not in the picture. *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995) (holding that the employer properly delayed announcement of a wage increase during a union election to avoid the appearance of election interference). *Wal-Mart*, 352 NLRB at 816. Such claims typically arise under Section 8(a)(1) or Section 8(a)(3) of the Act.

Conversely, after a union is certified, an employer has an obligation to negotiate with that union and cannot unilaterally change a condition of employment. *NLRB v. Katz*, 369 U.S. 736 (1962) (holding that an employer violates the Act if it unilaterally changes a term or condition of employment during the collective bargaining process); *Wal-Mart*, 352 NLRB at 816. Ordinarily, an allegation related to an employer's post-certification change in benefits is considered a violation of Section 8(a)(5) of the Act. *See* 29 U.S.C. § 158(a)(5) (providing that an employer commits an unfair labor practice if it refuses to bargain collectively with the representatives of its employees).

As noted, the initial charge filed by the Union in this matter alleged that Giant Eagle violated Section 8(a)(5) because the pension freeze announced a unilateral change without affording the Union the opportunity to negotiate and bargain as the Employees' exclusive representative. (Original Union Charge, 11/28/16, at ¶ 8). This claim, however, was not ultimately pursued by General Counsel, who correctly concluded that Giant Eagle, after providing the catering Employees with direct notice of the company-wide freeze, subsequently provided the Union with notice and the opportunity to bargain on the issue of Employee pensions. *See Raybestos-Manhattan Inc.*, 168 NLRB 396, 405-06 (1967) (holding that an

two-member Board, and is therefore of questionable validity under *New Process Steel*. However, this only calls the Board's ultimate mandate into question, and there is no basis for questioning the Board's legal analysis as to the dichotomy between pre-election claims and post-certification claims, which has its basis in well-settled precedent.

employer's initial technical violation of Section 8(a)(5) in the announcement of a wage change was cured when the union was thereafter given the opportunity to bargain on that issue); *see also Abrahamson Chrysler-Plymouth, Inc.*, 234 NLRB 955, 971 (1978) (stating that "absence of formal notification by an employer will not be controlling if the union has actual notice of an employer's intentions at a time when there is sufficient opportunity to bargain prior to implementation of a change"). Notwithstanding its conclusion in this regard, General Counsel inexplicably elected to pursue an independent Section 8(a)(1) violation stemming from the post-certification pension freeze announcement. Given that the announcement occurred after the Union election, and the Section 8(a)(5) charge was not ultimately pursued by General Counsel, nothing about the pension freeze announcement tended to coerce or restrain Employees in the exercise of their rights under the Act. Accordingly, General Counsel has failed to demonstrate any unfair labor practice arising from Giant Eagle's pension freeze notice.

IV. Conclusion

For the reasons set forth above, General Counsel has failed to demonstrate that Giant Eagle committed any unfair labor practices pursuant to Section 8(a)(1) of the Act. Accordingly, Giant Eagle respectfully requests that the Complaint in this matter be dismissed in its entirety.

Respectfully submitted,



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